IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 28 OF 2006.

M/s Travel Force,
Hede Consultancy Co. Ltd., Durga Bhavan,
Hede Centre, Tonca, Panaji-Goa. …… Petitioner

V e r s u s

1. Dr. Mohan N. Bhave,
41, Manali, Hanuman Cross Road,
Vile Parle (East), Mumbai – 400 057.

2. State of Goa,
through the Public Prosecutor,
Panaji – Goa. …… Respondents

Mr. V. B. Nadkarni, Senior Advocate with Mr. Y. V. Nadkarni, Advocate for the Petitioner.
Mr. A. D. Bhobe, Advocate for Respondent no.1.

Mr. C. A. Ferreira, Public Prosecutor for Respondent no. 2.

CORAM: N. A. BRITTO, J.

DATE: 19th October, 2006.

ORAL JUDGMENT

This is complainant's revision against the Order dated 17.03.2006 of the learned Additional Sessions Judge, Panaji.

2. The parties hereto are referred to in the names as they appear in the cause title of the complaint.

3. The complainant claiming to be a division of M/s. Hede

Consultancy Co. Ltd., Company, Ltd., prosecuted the accused for bouncing of a cheque bearing no. 339472 dated 10.08.2000 for a sum of Rs.12,00,000/-. It appears from the complaint that by letter dated 26.09.2000, the accused had requested the Complainant to forward the fixed deposit receipt against the payment of Rs.12,00,000/-. The Complainant had presented the said cheque for payment but was returned by bank with remark that the payment was stopped by drawer and this was by Memorandum dated 22.09.2000. The Complainant thereupon served a notice upon the accused dated 04.10.2000, calling upon the accused to pay the said amount of Rs.12,00,000/- which was returned unclaimed and the accused having failed to comply with the said notice, the Complainant filed the complaint on or about 17.11.2000.

4. After the Complainant's statement on oath was recorded, the learned J.M.F.C. was pleased to order issuance of process against the accused, vide his Order dated 30.07.2001, under Section 138 of the Negotiable Instruments Act, 1881, ('Act' for short). It appears that on or about 24.02.2004, the accused applied for recall of process but the said application came to be dismissed by Order dated 07.10.2004. As against the said Order dated 07.10.2004, the accused approached this Court, invoking extraordinary jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973, but this Court declined to exercise the said extraordinary jurisdiction vide Order dated 06.04.2005 in Criminal Misc. Application No. 52/2005, holding that the accused had remedy of revision available to him under Section 397 of the Code (Cr.P.C.), and therefore,

this Court need not exercise its jurisdiction either under Section 482 of the Code or under Article 227 of the Constitution. The Application filed by the accused was ordered to be returned with the following observations:-

> "14. The petition/application of the applicant shall therefore be returned to him and he will be at liberty to present the same before the Court of Sessions. In case the petition is presented within a period of 15 days after the same is returned to the applicant, the learned Sessions Judge shall register the same as a revision application against the order issuing process against the accused and dispose of the same as expeditiously as possible, in accordance with law."

5. It appears that on behalf of the Complainant, an objection was taken before the learned Sessions Judge that the revision which the learned Sessions Judge was required to entertain, against the said Order dated 30.07.2001, issuing process against the accused was time barred. The learned Additional Sessions Judge has held that the said revision was filed on behalf of the accused in terms of the Order of this Court dated 06.04.2005. It is submitted on behalf of the Complainant, by Shri Nadkarni, the learned Senior Counsel, that the learned Sessions Judge was required by this Court vide Order dated 06.04.2005,to decide the revision in accordance with law and, therefore, since the said revision was not filed within the prescribed time from 30.07.2001, it was necessary for the accused to have filed an application for condonation of delay and in the absence of such

an application, the revision could not have been entertained. In my view, the Order of the learned Additional Sessions Judge could not be faulted on this score. It is quite probable that by the time the accused had approached this Court by invoking the extraordinary jurisdiction, any revision to be filed against Order dated 30.07.2001, issuing process against the accused or Order dated 24.02.2004 refusing to recall the process issued against the accused might have been time barred. Nevertheless, this Court rightly or wrongly permitted the accused to present the application filed by him within 15 days after the same was returned to the accused. There is no dispute that the accused obtained the said application filed before this Court and presented it before the Court of Sessions within the said period of 15 days. This Court by virtue of the said Order dated 06.04.2005, further directed the learned Sessions Judge to register the said application as a revision application against the Order issuing process against the accused and disposed of the same as expeditiously as possible, in accordance with law. It follows therefrom that the accused in the light of the Order of this Court dated 06.04.2005, was not required to file a separate application for condonation of delay in presenting the said application which was made earlier to this Court and which was directed to be treated as a revision application by the Court of Sessions. In a situation such as this, the contention that the said revision was time barred, cannot be entertained.

6. The learned Sessions Judge by her Order dated 17.03.2006, has set aside the Order issuing process against the accused under Section 138 of the Act.

In doing so, the learned Additional Sessions Judge, has observed that if one goes through the complaint filed, it becomes clear that the cheque in question was issued by the applicant was for investment in fixed deposit, since the Complainant-Company, accepted fixed deposits in their schemes and on the face of the complaint it was clear that the cheque in question was not issued for discharge in whole or in part of any debt or other liability, and therefore, no presumption of any nature much less under Section 139 of the Act, could arise in favour of the Complainant and therefore the question of rebuttal by the accused did not arise.

7. As already stated, there is no dispute that the subject cheque for Rs.12,00,000/-, when presented by the Complainant for encashment, was returned dishonoured by the Bank by endrosement dated 29.09.2000, with a remark that the payment was stopped by drawer. There is also no dispute that the Complainant had subsequently served the statutory demand notice dated 04.10.2000, calling upon the accused to make the payment due on the said cheque within a period of 15 days, which notice was returned unclaimed and the accused had not complied with the said requisition in the said notice.

8. There is also no dispute that the Complainant had issued three cheques to the accused bearing nos. 145490, 145491 and 145492, each for a sum of Rs.4,00,000/-, which cheques, it is stated, were presented by the accused for payment and on account of dishounour of the said cheques, the Complainant is

facing a prosecution under Section 138 of the Act, which is pending before the Court at Mumbai. However, it is contended on behalf of the accused that the said three cheques in the sum of Rs.4,00,000/- each, were issued by the Complainant vide his letter dated 10.10.2000 and that too after the subject cheque was returned dishonoured to the Complainant and the issuance of the said three cheques had nothing to do with the dishonour of the subject cheque and they pertained to an entirely different transaction. However, Shri Nadkarni, the learned Senior Counsel on behalf of the Complainant has submitted that the said three cheques were issued by the Complainznt to the accused in consideration of the accused having issued to the Complainant the subject cheque of Rs.12,00,000/-. Shri Nadkarni has further submitted that once the accused had issued the subject cheque in favour of the Complainant, a presumption in terms of Section 139 of the Act arose in favour of the Complainant and the said presumptions could be rebutted or displaced only at the time of the trial and after evidence was led. In support of this submission, Shri Nadkarni, has placed reliance on several Judgments.

9. In ***K. N. Beena v. Muniyappan & anr. ((2001) 8 S.C.C. 458)***, the Apex Court observed that, the Judgment erroneously proceeded on the basis that the burden of proving consideration for a dishonoured cheque is on the Complainant. It appears that the learned Judge had lost sight of Section 118 and 139 of the Negotiable Instruments Act. Under Section 118, unless the contrary was proved, it is to be presumed that the negotiable instruments, (including a

cheque), had been made or drawn for consideration. Under Section 139, the Court has to presume unless the contrary was proved that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. Thus, in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused. This Court in the case of ***Hiten P. Dalal v. Bratindranath Banerjee ((2001) 6 S.C.C. 16)***, had also taken an identical view.

10. In the case of ***M. M. T. C. Ltd & anr. v. MEDCHL Chemicals and Pharma (P) Ltd. & Anr. ((2002) 1 S.C.C. 234)***. The Apex Court referring to ***Maruti Udyog Ltd. v. Narender***, observed that, this Court has held that by virtue of Section 139 of the Negotiable Instruments Act, the Court has to draw a presumption that the holder of the cheque received the cheque for discharge of a debt or liability until the contrary is proved. This Court has held that at the initial stage of the proceedings, the High Court was not justified in entertaining and accepting a plea that there was no debt or liability and thereby quashing the complaint.

11. In the case of ***A. V. Murthy v. B. S. Nagabasavanna (AIR 2002 S.C. 985)***, the Supreme Court observed thus:

"As the complaint has been rejected at the threshold,

> we do not propose to express any opinion on this question as the matter is yet to be agitated by the parties. But, we are of the view that the learned Sessions Judge and the learned single Judge of the High Court were clearly in error in quashing the complaint proceedings. Under Section 118 of the Act, there is a presumption that until the contrary is proved, every negotiable instrument was drawn for consideration. Even under Section 139 of the Act, it is specifically stated that it shall be presumed, unless the contrary is proved that, the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability."

12. Shri Nadkarni submits that the complainant's case that the three cheques, each of for Rs.4,00,000/- were issued by the Complainant to the accused in consideration of the subject cheque issued by the accused to the Complainant is reflected in the statutory notice sent by the Complainant to the accused and the same was forming part of the complaint and on that basis, the process issued against the accused could not have been set aside by the learned Additional Sessions Judge.

13. There can be no dispute that process against the accused is issued, in terms of Section 200 of the Code of Criminal Procedure, 1973, based on the complaint and the sworn statement of the complainant in support thereof. In this

context, reference to an observation of the Supreme Court in ***Sabitha Ramamurthy & anr. v. R. B. S. Channabasavaradhya (2006 AIR SCW 4582)***, will not be out of context, wherein the Apex Court has stated that "*in terms of Section 200 of the Code of Criminal Procedure, the Complainant is bound to make statement on oath as to how the offence has been committed and how the accused persons are responsible therefor*." A perusal of the statement on oath of the Complainant does not show that the said three cheques in the sum of Rs.4,00,000/- each were issued by the Complainant to the accused in consideration of the subject cheque issued by the accused to the Complainant. On the contrary, Para 2, clearly shows that the Complainant accepts Fixed Deposits in their schemes and that as the accused was interested in the said schemes, had offered to place with the Complainant as a Fixed Deposit, the said sum of Rs.12,00,000/- and had issued the subject cheque dated 10.08.2000, drawn in favour of the Complainant. It is this cheque which got bounced and on account of which, the Complainant prosecuted the accused. In case the said three cheques issued by the Complainant to the accused were issued by way of consideration towards the subject cheque issued by the accused to the Complainant, then obviously, the Complainant having failed to encash the subject cheque, the said three cheques would be without any consideration but I must hasten to add that it is the matter that would be solely decided by the Court which has taken cognizance of the offence for the dishonour of the said three cheques. Suffice it to say that the statement on oath of the Complainant does not show that the said three cheques for Rs.4,00,000/- each, were issued by the Complainant to the

accused as consideration for issuance of the subject cheque by the accused to the Complainant and on the contrary, the very averments in the complaint showed that the accused had given the subject cheque to the Complainant in the sum of Rs.12,00,000/- by way of investment in one of the Fixed Deposit Schemes of the Complainant. The letter dated 26.09.2000, produced by the Complainant, written by the accused to the Complainant, shows that the Complainant had not even received the fixed deposit certificate towards the said Fixed Deposit. On behalf of the Complainant, reference is made to Para 9(c) of the application made before this Court namely the said Criminal Misc. Application no. 52/2005, to say that the accused had instructed the Bank to stop payment vide letter dated 08.08.2002 i.e. even before the subject cheque dated 10.08.2000 was issued. It is submitted on behalf of the accused by Shri Bhobe that the said date could have been wrongly stated. It is not necessary for the purpose of this revision, to enter into the said controversy. Suffice it to observe that there was no question of drawing any presumption in favour of the Complainant in the light of the facts stated by the Complainant himself in his complaint and which showed that the subject cheque was given by the accused to the Complainant towards investment in one of the Complainant's Fixed Deposit Schemes. The conclusion arrived at by the learned Additional Sessions Judge that the cheque was issued without consideration or that it was not issued towards the discharge of any debt or liability as contemplated under Section 138 of the Act, could not be faulted.

14. In view of the above, I find there is no merit in this revision,

consequently, the same is hereby dismissed with no order as to costs.

N. A. BRITTO, J.

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